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No. 96-1361

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

THE BRONX HOUSEHOLD OF FAITH,
JACK ROBERTS AND ROBERT HALL,

Petitioners,

- v. -

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT NO. 10, AND CHARLES WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether a public school district which has opened its school buildings to certain after-hour uses enumerated in State law is constitutionally required to rent its facilities to a church for regularly scheduled religious worship services?

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STATEMENT OF THE CASE

Petitioners Bronx Household of Faith, an evangelic Christian Church, and its pastors, Robert Hall and Jack Roberts (collectively, "the Church") commenced this action seeking declaratory and injunctive relief against respondents Community School District No. 10 (the "Community School District"), the Board of Education of the City of New York (the "Board"), and Charles Williams, President of the Board of Education for the Community School District (collectively, "the District"). The Church alleges that the District denied it the use of Public School M.S. 206B, known as the Anne Cross Mersereau Middle School (the "Mersereau School") for regularly scheduled religious worship services and that this denial was made pursuant to the Board's Standard Operating Procedures and section 414 of the New York State Education Law, upon which those procedures are based. The Church argues that section 414 and the Board's operating procedures, insofar as they prohibit the Church from conducting weekly church worship services on public school property, violate the Free Speech, Free Exercise and Establishment Clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment.

The Parties

The Community School District has a student population of over 40,000 students attending pre-kindergarten through eighth grade in its 44 public schools located in the Bronx (JA7).[1] The Mersereau School is located in the

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[1] Numbers in parentheses preceded by a "JA" refer to pages in the Joint Appendix submitted to the Court of Appeals. Numbers in parentheses preceded by "App." refer to the Appendix to the Petition for Writ of Certiorari.

Community School District and has students attending grades five through seven and ranging from nine to twelve years of age (JA14). Both the Community School District and its officers are bound to follow the Board's operating procedures.

Petitioner Bronx Household of Faith is an evangelical Christian Church formed in 1971 (JA104). Members of the Church have children attending schools within the confines of the Community School District, including the Mersereau School (JA15-16).

The Dispute

By letter dated September 8, 1994, the Church requested permission to rent the gymnasium of the Mersereau School on "each and every Sunday" from 10:00 a.m. to 1:00 p.m. "for the purpose of conducting church worship services" (JA102). The letter stated that the Church would conduct such activities as "hymns singing, communion, Bible reading, Bible preaching and teaching." Id. During the worship service, the Church would conduct a "collection" to gather contributions to support the Church (JA14). The collection generally would result in the Church receiving an amount in excess of the rental for the school space. Id. By letter dated November 9, 1994, the Church again requested use of the school, stating that its present location had become too crowded (JA103). The District denied the Church's request (JA14).

Statutory and Regulatory Framework

New York Education Law section 414 governs the use of public school facilities by non-school groups during non-school hours. The statute, the relevant provisions of which have been in effect since 1910, sets forth a list of uses which

a local school district may, in its discretion, permit in their facilities during such hours. While not expressly excluded in the statute, religious worship and instruction are not among the enumerated uses.

In compliance with section 414, the Board has promulgated rules which list the permissible uses of school facilities as provided by that section. The Standard Operating Procedures published by the Board include a chapter entitled Extended Use of School Facilities (JA17-37). Topic 5 of that chapter sets forth the "Regulations Governing the Extended Use of School Facilities," which, in large part, track the language of Education Law § 414 in listing the permissible uses of the District's school buildings (JA26-27). The operating procedures also contain a catch-all provision in section 5.6.6, which provides that school premises may be used "for such other purposes as may be authorized by law" (App. 53a). Since section 414 establishes those "purposes [which are] authorized by law" in New York State, this catch-all provision renders the District's operating procedures coextensive with section 414.

Consistent with the interpretation of section 414 given by New York State courts, section 5.9 of the operating procedures states that religious worship services are not an authorized use of school facilities (App. 53a). In accordance with this Court's precedence, that section does permit "the use of school premises by outside organizations . . . for the purpose of discussing religious material or material which contains a religious viewpoint" (App. 53a).

Section 414 and the Board's operating procedures exclude numerous uses in addition to religious worship services. For instance, procedure section 5.6.3 bars "meetings

sponsored by political organizations" without prior approval of the Board of Education and procedure section 5.8 prohibits the use of school premises for most commercial purposes (JA27).

The parties agree that while the Community School District has rented its school facilities to "outside organizations or groups" for purposes identified in section 414 and the Board's operating procedures -- including after school tutoring, adult education classes, cultural awareness lectures and athletic events for children -- the Community School District has never rented public school space to any organization or group for the purpose of conducting religious worship services (App. 35a). The Community School District has rented space to the Church for permissible activities such as athletic events and a banquet (JA13-14). The Community School District has also rented facilities to other churches and religious groups for activities expressly permitted in the operating procedures including, for example, to the Grace Lutheran Church for a program on Black History and to the Greek Orthodox Community Church for the teaching of Greek culture, history and language (JA10-11). The parties agree that the fee charged for the space requested is below market rent (JA13), so that the ability to use the space would represent an economic benefit and subsidy to the Church.

After the denial of the Church's request to rent space in the Mersereau School, the Church brought suit in the Supreme Court of the State of New York under 42 U.S.C. § 1983. After the District removed the case to federal court, the Church moved for summary judgment arguing that its rights had been violated under the Free Speech, Free Exercise and Establishment Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Religious Freedom Restoration Act. The District cross-moved

for summary judgment, arguing that Education 414 and the Board's operating procedures were constitutional.

District Court Decision

In its well-reasoned decision, the District Court rejected the Church's challenge to section 414 and the Board's operating procedures. 1996 U.S. Dist. LEXIS 18044 (reprinted at App. 32a-45a). The District Court correctly held that the Mersereau School was a "limited public forum" which was closed to all unspecified uses and excluded uses (App. 43a). The District Court rejected the Church's argument that a church was just another "social" or "civic" activity permitted under section 414, noting that churches have historically and constitutionally been treated differently from other social, cultural and civic activities (App. 41a, n.1). Examining the past practice of the Community School District, the District Court found that it had consistently applied its rules to exclude activities prohibited by statute and Board operating procedures (App. 43a). The District Court also correctly concluded that the Community School District had demonstrated no intent to create an open forum in the Mersereau School. Id.

Having determined that the Mersereau School was a "limited public forum," the District Court then ruled that the exclusion of religious worship services was "reasonably related to a legitimate government concern" (App. 43a-44a). The Court found that the District had a legitimate interest in "preserving and prioritizing access to the middle school primarily for education purposes and, secondarily, for nonexclusive public and community activities" (App. 44a).

The District Court also rejected the Church's Establishment Clause and Equal Protection claims (App. 44a).

The Court found these claims to be based upon the supposition that the Mersereau School was a public forum. Having rejected this premise in its Free Speech Clause analysis, the District Court denied those other claims as well (App. 44a).

Court of Appeals Decision

Writing in two separate opinions, the Second Circuit unanimously affirmed the judgment of the District Court. 127 F.3d 207 (2d Cir. 1997), rehearing and rehearing en banc denied, _ F.3d _ (2d Cir. Nov. 27, 1997) (reprinted at App. 1a-31a). Both the majority and concurring opinions rejected the Church's argument that the School District's after-school use policy had transformed the Mersereau School into a public forum (App. 9a-14a; 23a-24a). The Second Circuit correctly held that a public school "simply is not a place that has been devoted to general, unrestricted public assembly by long tradition or by policy or practice" (App. 11a).

Viewing the Mersereau School as limited public forum, the Second Circuit unanimously held that the prohibition of religious worship services was both reasonable and viewpoint neutral (App. 14a-16a; 30a). The Court found reasonable the State's desire to avoid identification of a public middle school with a particular church, especially in the minds of middle school children (App. 14a-15a). The Court also held that it was "not unreasonable to assume that church services can be undertaken in some place of public assembly other than a public middle school" (App. 15a).

The Second Circuit concluded as well that the policy of the State and the School District was viewpoint neutral because the school has never been opened to any group for religious worship services (App. 15a). The Circuit found that there was

a recognizable distinction between religious worship and the discussion of secular matters from a religious viewpoint, and that the blanket exclusion of the former was not discriminatory (App. 16a). The Second Circuit also rejected petitioners' Equal Protection, Free Exercise, Establishment Clause and Religious Freedom Restoration Act claims (App. 17a-20a).

In his concurring opinion, Judge Cabranes agreed with the majority that the exclusion of religious worship services was reasonable and viewpoint neutral (App. 241-30a). Judge Cabranes wrote to express his opinion that the State's exclusion of religious instruction, as opposed to religious worship, was not viewpoint neutral since instruction on other topics was permitted (App. 27a-30a). However, Judge Cabranes did not need to reach this issue because the Church never requested the use of the Mersereau School for religious instruction.

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT WAS CORRECT IN HOLDING THAT THE MERSEREAU SCHOOL WAS A LIMITED PUBLIC FORUM, AND THAT THE EXCLUSION OF RELIGIOUS WORSHIP SERVICES FROM THAT FORUM WAS REASONABLE AND VIEWPOINT NEUTRAL.

The writ should be denied because the Court of Appeals correctly applied the teachings of this Court when it held that the Mersereau School was a limited public forum and that the exclusion of religious worship services from that forum was reasonable and viewpoint neutral.

A. The Mersereau School is, at Most, A "Limited Public Forum" Which Has Not Been Opened to Religious Worship Services.

The Church contends that Education Law section 414 and the Board's operating procedures, which implement section 414, violate the Church's First Amendment right to free speech by prohibiting it from leasing a public school building to conduct weekly religious worship services. Where a party claims that its right to free speech on public property has been violated, the first inquiry is whether the public property in question is: (1) a traditional public forum; (2) a designated public forum, either limited or not limited; or (3) a nonpublic forum. International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 678-79 (1992).

A "traditional public forum" is "government property that has traditionally been available for public expression" such as parks and streets. Krishna Consciousness, 505 U.S. at 678. Regulations of speech on such property are "subject to the highest scrutiny" and "survive only if they are narrowly drawn to achieve a compelling state interest." Id.

A "designated public forum," is property that the State has opened for expressive activity by part or all of the public and either for all or certain subject matters. Id. A "designated forum" may be "limited" or "unlimited." Id. Where the designated forum permits unlimited speech for a specific group of people, the forum is treated like a traditional forum, where any restriction must be narrowly drawn to achieve a compelling state interest. Widmar v. Vincent, 454 U.S. 263 (1981). Where the designated forum is "limited," restrictions as to subject matter need only be "reasonable and viewpoint neutral." Rosenberger v. Rector Visitors of University of

Virginia, 515 U.S. 819, 829 (1995) (with a limited designated forum "[t]he State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum' . . . nor may it discriminate against speech on the basis of its viewpoint").

All other public property falls into the category of "nonpublic forum" where a government's regulation of expressive activity "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." Krishna Consciousness, 505 U.S. at 679.

This Court has recognized that a public school is not a traditional public forum. A school district, "like a private owner of property, may legally preserve the property under its control for the use to which it is dedicated." Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 390 (1993). In Lamb's Chapel, this Court determined that "[c]ontrol over access" to a public school that has not been designated an open forum "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and viewpoint neutral.'" Id. at 392-93.

To succeed in its First Amendment claim, the Church must establish that New York State's access policy has created a either designated open forum or a limited public forum encompassing religious worship services. Section 414, on its face, does not create an open forum. By enumerating a list of permissible uses, the statute evinces a purpose to exclude all non-listed purposes. As this Court held in Cornelius v. NAACP Defense & Ed. Fund, Inc., 473 U.S. 788, 802 (1985), the "government does not create a public forum by inaction or

by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse."

Nor, as the New York State courts have held, does section 414 create a limited public forum open to religious worship services. See Trietley v. Board of Educ., 65 AD2d 1 (4th Dep't 1978). Section 414, first enacted in 1910, sets forth ten categories of uses which are permitted on school property. In addition to religious worship services, numerous other possible uses are not listed in the statute, including political meetings, commercial uses, labor union meetings, and the meetings of fraternal organizations, such as the Elks or Lions.

B. The List of Permissible After-Hour Uses Contained in Education Law Section 414 is not so Broad as to Render All the Public Schools of the State of New York Open Forums Available for Any Use By Any Group Whatsoever.

The Church argues that section 414 renders the public schools of New York State open to all conceivable uses by permitting a broad range of uses under the category of "[s]ocial, civic and recreational" meetings in subdivision (c) of section 414 (Pet. at 13). Yet, however broad this phrase may be, this Court has already recognized that religious organizations are not just another "social" or "civic" group, but rather, may be treated differently and exempted from generally applicable laws. For example, in Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987), the Court upheld the exemption for religious organizations from Title VII's prohibition against employment discrimination on the basis of religion.

Moreover, as noted above, there are a variety of activities which the Board's operating procedures and section 414 do not permit in school facilities during after-school hours. The existence of impermissible uses is ample evidence of the government's intent to create a limited public forum rather than an open public forum. Cornelius, 473 U.S. at 803.

In urging this Court to declare that by opening the public schools of the State of New York to a wide variety of non-religious uses, section 414 opened the public schools to religious worship services, the Church relies on what it calls an "anvil-like hint" in Lamb's Chapel that section 414 renders all of the public schools of New York State open forums (Pet. at 18-19).

In Lamb's Chapel, this Court wrote (508 U.S. at 391):

> The Church argued below that because under Rule 10 of the rules issued by the District, school property could be used for "social, civic, and recreational" purposes, the District had opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public fora . . . . The argument has considerable force, for the District's property is heavily used by a wide variety of private organizations, including some that presented a "close question" . . . as to whether the District had in fact already opened its property for religious uses (footnote omitted).

The Church tellingly omits from its reprinting of this quotation the last portion in which this Court suggests that the argument has force only because the school district in that case may have permitted "religious uses" in the past (Pet. at 19). The Church omits as well the footnote immediately following that passage in which the Court discussed these past religious uses, which included a "New Age religious group known as the 'Mind Center,'" a group of gospel singers and the salvation army youth band. 508 U.S. at 391-92 n.5. The Court noted that the first use, which involved a lecture series by a psychotherapist on topics including parapsychology and metaphysics, with "reference[s] to religious matters" was "particularly interesting and relevant to the issue before us." Id. at 392 n.5. Thus, when read in context, the cited passage gives no hint -- anvil-like or otherwise -- that where a State has opened its schools to a variety of non-religious uses, it must also open its schools to all public uses, including religious worship services.

C. Nor Has The District Created an Open Forum Either Through the Board's Operating Procedures or Through the District's Prior Practices.

The Church also argues that the District has allowed its public schools to become open forums through both the Board's operating procedures and the Community School District's past practices. The District Court and the Second Circuit correctly found that there was no evidence that the District, by its procedures or its practice, intended to create an open forum.

The language of the Board's operating procedures makes it abundantly clear that the State and City had no intention of converting their school facilities into open public

forums. First, the fact that the operating procedures require that users seek permission to use the forum (JA19), is a strong indication that no open forum was created. See Cornelius, 473 U.S. at 803. Second, sections 5.3 and 5.5 of the operating procedures prioritize the use of public school facilities (JA26). The favoring of some subject matters over others could not be contemplated if the government intended an open forum. Without this policy of prioritizing, the District would have core educational activities, such as after-school tutoring, competing on an equal footing for time and space with non-educational activities.

The Church erroneously relies on the fact that the Board's operating procedures permit "such other uses as may be authorized by law" (Pet. at 13). The only natural reading of this provision, however, is that it refers back to section 414, which enumerates all the uses of public school facilities "authorized by law." This provision indicates that the City's operating procedures and the State statute 414 are co-extensive.

The Church further argues that the Community School District created an open forum on the basis of past practice by permitting a wide range of groups to use its facilities (Pet. at 13). But the Church does not suggest that any of the uses permitted by the District was broader than those permitted by either Board's operating procedures or Education Law section 414. Nor does the Church claim that any of the prior uses were similar to religious worship. As noted above, the parties have stipulated that the school district "has never rented school facilities to non-school groups or organizations . . . for the purpose of conducting religious worship services and religious instruction" (App. 7a-8a).

Thus, the Community School District has not by its procedures or past practices intentionally or inadvertently opened its doors to renting its facilities to regularly scheduled religious worship services.

D. The Second Circuit's Decision in this Case is Not in Conflict with Any Prior Decision of this Court or any other Federal Court.

The Church errs when it argues that this Court and five federal Circuit Courts of Appeals "have found that similar policies created public forums" (Pet. at 13). The Church relies primarily on Widmar v. Vincent in which the issue presented was the right of college students to meet for religious worship services on their own university campus. In contrast to the restriction-laden policy at issue here, the university in Widmar had created a truly open forum in which any legitimate student group was permitted to meet. See Chess v. Widmar, 635 F.2d 1310, 1312 (8th Cir. 1980), aff'd sub nom., Widmar v. Vincent, 454 U.S. 263 (1981). Indeed, this Court characterized the University campus in Widmar as a "public forum." 454 U.S. at 270.

The Second Circuit in a prior decision upholding the exclusion of religious worship services in the public schools, Deeper Life Christian Fellowship, Inc. v. Board of Education, 852 F.2d 676, 679 (2d Cir. 1988), correctly distinguished the Widmar decision:

> Widmar, however, does not control the result here. As the Supreme Court pointed out in a later case, in Widmar it had "noted that a university campus, at least as to its students, possesses many of the characteristics of a

> traditional public forum," Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 803 . . . (1985), thereby subjecting attempts at regulating use of the property to the most exacting constitutional standards as to the forum's intended beneficiaries.

In reliance on footnote 6 in the Widmar decision, the Church also argues that religious worship services must be permitted wherever "religious discussion" is allowed because there is no intelligible way to distinguish between "religious discussion" and "religious worship" (Pet. at 22-25). The problem with this argument is that it would open all limited public forums to religious worship services. Under Lamb's Chapel and Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), a government which has opened a forum to speech on a particular subject-matter from a secular viewpoint, must also open the forum to speech on the same topic from a religious viewpoint. The Church argues that the forum must then be opened to religious worship services as well.

The absurdity of the Church's argument is demonstrated by an example: Once an elementary school invites a speaker to discuss any topic imaginable, for example fire-safety, the school is required, under Lamb's Chapel, also to permit a discussion of fire-safety from a religious viewpoint. Under the Church's faulty syllogism, the school would then also be obligated to permit outside groups to conduct religious worship services on school grounds -- because of the perceived inability to distinguish between a discussion of fire-safety from a religious viewpoint and a religious worship service.

While the Second Circuit's decision may result in school districts and courts having to make difficult distinctions between religious worship services and other forms of religious speech, the special status given to religion and religious organizations by the Constitution and various federal and state laws render such line-drawing inevitable. For example, section 107 of the Tax Code, which exempts the rental value of a parsonage from a "minister of the gospel's" gross income, has required federal courts to examine whether a particular member of the clergy is performing religious worship services. Tanenbaum v. C.I.R., 58 T.C. 1 (1972) (holding that a rabbi employed by the American Jewish Committee was not entitled to the section 107 exemption because he did not perform "any sacerdotal duties or conduct religious worship").[2]

Such line drawing arises in other contexts as well. For example, it is well-recognized that public school students may discuss religious materials from a historical or literary

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[2] One may also note that Congress frequently provides that money earmarked for such purposes as education grants, facilities for the elderly, and child care block grants may not be used for programs involving religious worship or instruction. See, e.g., 20 U.S.C. § 1069c (certain grants to higher education institutions "may not be used . . . for . . . any religious worship or sectarian activity."); 42 U.S.C. § 3027(a)(14)(A)(iv) (requiring states seeking federal aid for construction of centers for the elderly to submit plans providing assurances that "the facilit[ies] will not be used and [are] not intended to be used for sectarian instruction or as . . . . place[s] for religious worship")' 42 U.S.C. § 9858k(a) (no child care or development block grants "shall be expended for any sectarian purpose or activity, including sectarian worship or instruction.").

perspective, Abington School District v. Schempp, 374 U.S. 203, 300 (1963) (Brennan, J., concurring), or perform religious music, such as a Mozart requiem, at a school concert. Surely, the Church cannot seriously argue that discussions of the religious material and the performance of religious music must be banished from the public schools because of the theoretical difficulty in drawing clear lines between such activities and religious worship services.

In any event, the facts of this case do not remotely approach any difficult boundaries: The Church wishes to use the school on a permanent basis as its house of worship. Absent evidence that the School District discriminated against the Church by permitting worship activities by other religious organizations, or excluded the Church from expressing its views in the context of activities permitted within the limited public forum, the Church's claim must fail.

The Church also asserts -- without elaboration -- that the Second Circuit's decision conflicts with this Court's decisions in Board of Education v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel, and Fowler v. Rhode Island, 345 U.S. 67 (1953) (Pet. at 18). Each of these cases is distinguishable from the present case. In Mergens, this Court upheld the Equal Access Act which mandates that secondary schools which permit non-curriculum-related student groups to meet on school property, not prevent other student group meetings "on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 496 U.S. at 235. This case is distinguishable because the Court did not hold that the Free Speech Clause required school districts to adopt such a policy.

In Fowler, this Court struck down an ordinance which was applied to bar a group of Jehovah's Witnesses from conducting a religious worship service in a public park where other groups had been permitted to conduct religious services in the same location. No such viewpoint discrimination has been alleged here.

And in Lamb's Chapel, this Court held that a school district could not exclude a discussion of a subject matter from a religious viewpoint, if it permitted discussion of the same subject matter from a secular viewpoint. 508 U.S. at 394. As concurring Judge Cabranes found, there is no viewpoint discrimination in this case because there is no secular equivalent of a religious worship service (App. 30a).

The Second Circuit's decision is also not in conflict with the other Circuit Court decisions cited by the Church (Pet. at 15-17). In Gregoire v. Centennial School District, 907 F.2d 1366 (3rd Cir. 1990), cert. denied, 498 U.S. 899 (1990), the Third Circuit struck down a policy excluding religious speech in the evening at public schools because the policy allowed religious speech in the afternoon. 907 F.2d at 1379. Similarly, in Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir. 1994), cert. denied, 511 U.S. 1143 (1994), the Fourth Circuit struck down a policy under which the schools were open to religious groups but charged such groups a higher rental fee. In Grace Bible Fellowship v. Maine School Admin. District No. 5, 941 F.2d 45 (1st Cir. 1991), the First Circuit struck down the practice of excluding, not religious services, but, instead, the use of the public school facilities by religious groups. The actual practice of the District prohibited religious groups from conducting the same activity (in that case, a community dinner) that a secular group would have been allowed to conduct. This, of course,

would have been a clear violation of this Court's teaching in Lamb's Chapel. Finally, in Concerned Women for America v. Lafayette County, 883 F.2d 32 (5th Cir. 1989), the Fifth Circuit correctly recognized that the public library's policy governing the use of its auditorium created a limited forum, but incorrectly applied the "compelling state interest" test in striking down the policy at issue. In light of this Court's subsequent decisions in Lamb's Chapel and Rosenberger, holding that such policies should be evaluated under a "reasonableness" test, the Fifth Circuit's decision in Concerned Women can no longer be considered good law.

The Second Circuit's decision is also not in conflict with the district court decisions cited by the Church (Pet. at 17-18). In Wallace v. Washoe County School District, 818 F. Supp. 1346 (D. Nev. 1991), the school district had no well-defined guidelines and had permitted church groups to conduct "instructional" and "missionary" meetings in the past. Id. at 1350. In Country Hills Christian Church v. Unified School District, 560 F. Supp. 1207 (D. Kan. 1983), the school district had permitted other worship services. Id. at 1211. The remaining cases cited, Shumway v. Albany School District No. 1, 826 F. Supp. 1320 (D. Wyo. 1993); Randall v. Pegan, 765 F. Supp. 793 (W.D.N.Y. 1991); and Verbena United Methodist Church v. Chilton County Board of Education, 765 F. Supp. 704 (M.D. Ala. 1991), are distinguishable because they involved student baccalaureate services for graduating seniors. In addition, in all three cases, the school districts had previously opened their facilities to outside groups for religious functions. Shumway, 826 F. Supp. at 1325 (after request for use was submitted, the board changed its policy to exclude use by religious groups); Randall, 765 F. Supp. at 796 (school board "maintains an 'open forum policy' towards all . . . groups, both religious and non-religious"), Verbena, 765 F.

Supp. at 708 (board had policy of permitting religious functions).

E. The Exclusion of Religious Worship Services from Section 414's Enumeration of Authorized Uses of Public School Facilities is Reasonable and Viewpoint Neutral.

Once it is established that the school is neither a traditional public forum nor "a designated public forum open for indiscriminate public use," the standard to be applied to a subject matter based exclusion is whether "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Lamb's Chapel, 508 U.S. at 392-93. Accord Rosenberger, 515 U.S. at 829.

The exclusion of religious worship services is "reasonable" for the reasons outlined by the Second Circuit in the instant case (App. 14a-15a), and the Church does not argue otherwise. It was reasonable for the State and the school district to seek "to avoid the identification of a middle school with a particular church" and it was reasonable to "consider the effect upon the minds of middle school children of designating their school as a church." (App. 14a-15a). The State was also "reasonable" in limiting the use of school facilities to those programs which served children, education in general, or groups whose programs were aimed to serve the general public. In practice, all of the uses of the schools in this District were related to the core purposes of public schools: the education and social training of children and the education of the public in general (App. 6a-7a).

Finally, as discussed more fully in subpart F below, the desire to keep the schools from becoming "symbolically

link[ed]" with religion in violation of the concerns embodied in the Establishment Clause is also a legitimate policy reason which justifies the exclusion of religious services from public schools. Agostini v. Felton, __ U.S. __, 117 S. Ct. 1997, 2011 (1997).

F. Assuming Arguendo that the Mersereau School is an Open Forum, Compliance with the Establishment Clause is a Compelling State Interest Which Justifies the District's Refusal to Permit the Church to Conduct its Regularly Scheduled Services in that School.

Even if the Community School District is deemed to have created an open public forum, the exclusion of religious worship services is justified by the compelling state interest of compliance with the Establishment Clause. As a plurality of this Court recognized in Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995) (plurality opinion), such an interest would justify a content-based restriction on speech in an open forum. Id. at 762:

> There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.

In Agostini, this Court reaffirmed that the Establishment Clause prohibits a government from "creat[ing] the impression of a 'symbolic union' between church and state." __ U.S. at _; 117 S. Ct. at 2012. The permanent placement of a church in a school building would create more than just the impression of a symbolic union.

The Church seeks to conduct regularly scheduled worship services in a public school on a permanent basis. The natural consequence of the Church's argument here, would also require public schools to rent their facilities for church Sunday schools and even parochial education, if they could limit their use of the school buildings to after-school hours. A church might next ask to post a sign in front of the school identifying the building as the location of the church, if only to assist guests of the church attending a wedding or funeral. A church might also seek to store items related to religious worship on school property. The inevitable result of the acceptance of the Church's argument in this case would be the actual, as well as the symbolic, union of Church and School.

The opening of the public schools to religious worship services would also inevitably result in schools districts favoring some denominations over others. While theoretically, different religious groups could use different schools in a given district, in practice, given the number of religious denominations and given the special needs of some of these groups -- for example, the need to worship in walking distance of their homes -- there is no policy that a school district could adopt that would not discriminate against one group or another.[3]

This Court in Rosenberger suggested that a neutral "first-come, first-served" policy might avoid Establishment Clause problems in a given case, 515 U.S. at 843, but such a policy would not work here. If "first-come first-served" had been adopted three centuries ago, every school in New England

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[3] See F. Mead, Handbook of Denominations in the United States, (8th ed. 1988) (identifying over 232 major religious denominations in the United States).

would house the town's Congregational Church. Discrimination in favor of established sects and against newcomers -- a core violation of the Establishment Clause -- would be the almost certain outcome of a first-come, first-serve policy.

Indeed, any "neutral" policy that would give churches permanent use of public school facilities for regularly scheduled worship services would necessarily favor established religions, such as those that conduct services on Saturdays and Sundays. Friday sabbath observers would be excluded from the State's largess, based only on the conflict between their religious beliefs and the public school schedule. In addition, established religious groups, because they are already favored with the closing of schools on their major holidays, such as Christmas and Easter would be further favored by the rule urged by the Church in this case. Established religions would be able to celebrate their holidays in subsidized school facilities, while less established religious groups would not.[4]

In Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995), which involved a challenge to the display of a cross by the Ku Klux Klan in an open forum in front of an Ohio courthouse, five Justices took the view, either explicitly or implicitly, that the Establishment Clause forbids a government practice neutral towards religion which would lead to the "realistic danger that the community would think that the [State] was endorsing religion or any particular

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[4] For example, in New York City, the Moslem holidays of Idul-Fitr and Idul-Adha are recognized for traffic regulation purposes, see 11 Rules of the City of New York, title 34, § 4-08, but public school is still conducted on these holidays.

creed." 515 U.S. at 772 (O'Connor, Souter and Breyer JJ., concurring); accord 515 U.S. at 787 (Souter, O'Connor and Breyer, JJ., concurring); 515 U.S. at 799 (Stevens, J., dissenting); 515 U.S. at 817-18 (Ginsburg, J., dissenting). While the four Justice plurality wrote that the "community" in question were only those individuals in the community who were aware of the town's open forum policy with respect to the courthouse square, 515 U.S. at 765 (Scalia, J., plurality decision), this view appears to have been rejected by a majority of the Justices. Instead, one must look to a reasonable observer in the community as a whole. 515 U.S. at 772-73; 515 U.S. at 787.

Following the majority view, one may conclude that a reasonable observer -- i.e., one who may be unaware of a school district's open forum policy -- would view a church's permanent use of a public school facility at a subsidized level of rent, as the school district's endorsement of that denomination, as well as religion and religious worship in general.

These Establishment Clause concerns constitute a compelling state interest in maintaining the exclusion of religious worship services from public school buildings. Thus, even under the most exacting standard of review, the District's exclusion of regularly scheduled religious services does not violate the Church's First Amendment free speech rights.

II. SECTION 414 OF THE EDUCATION LAW DOES NOT VIOLATE THE FIRST AMENDMENT GUARANTEE OF FREE EXERCISE OF RELIGION.

The Church also argues that the public schools must be opened to religious worship under the Free Exercise Clause of the First Amendment (App. Br. at 46-47). The Church would have this Court hold that any time a government opened public property to speech on any topic, the refusal to also permit religious worship on that public property would constitute a substantial burden on religious exercise.

New York State's decision not to include religious worship among the activities permitted on public school grounds does not place a substantial burden on the exercise of religion. See Braunfeld v. Brown, Commissioner of Police, 366 U.S. 599, 605-06 (1961) (plurality opinion) ("legislation which does not make unlawful the religious practice itself" is at most an indirect burden on the exercise of religion). The Church is free to conduct their religious services anywhere else, and is free to conduct secular activities on public school grounds, as it has already done (JA13). Thus, this case bears no resemblance to those cited by the Church (Pet. at 27) where the exercise of certain practices by religious groups were outlawed in their entirety. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (striking down prohibition of animal sacrifice during religious ceremonies); Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (upholding prohibition on use of peyote during religious ceremonies).

III. SECTION 414 OF THE EDUCATION LAW DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

In reliance upon this Court's decision in Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), the Church argues that the Equal Protection Clause of the Fourteenth Amendment prohibits the exclusion of religious worship services from the public schools (Pet. at 28). But Mosley does not, as the Church contends, stand for the proposition that all subject matter-based restrictions violate the Equal Protection Clause (Pet. Br. at 28). In Mosley, the challenged ordinance prohibited picketing on public streets near school buildings. The Court held that under both the Equal Protection Clause and the First Amendment, the public street was a traditional public forum where content-based restrictions had to be justified by a compelling governmental interest. 408 U.S. at 96. Where, as here, the challenge involves a limited public forum, the Mosley analysis has no application.

IV. SECTION 414 OF THE EDUCATION LAW DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The Church also argues here -- although it did not so argue in the appellate court below -- that Section 414 violates the Establishment Clause of the First Amendment (Pet. at 26-27). The Church contends that the State's exclusion of religious worship services demonstrates its hostility towards religion. As in its Free Speech argument, the Church again takes the untenable position that once a public school opens itself to public discussion of any subject matter whatsoever, it must also allow religious worship services.

In evaluating a claim that a statute violates the Establishment Clause, this Court will look, inter alia, to

whether the statute has the purpose or effect of "inhibiting religion." Agostini, __ U.S. at __, 117 S. Ct. at 2010. The Church has neither argued, nor offered proof, that the exclusion of religious worship services from the list of permissible uses of public school buildings was intended to inhibit the practice of religion. Moreover, there is no evidence that this prohibition -- in place since 1910 -- has had or will have an adverse effect on religious practice in the State of New York. As the Second Circuit observed, "it is certainly not unreasonable to assume that church services can be undertaken in some place of public assembly other than a public middle school." (App. 15a).

For these reasons, Education Law § 414 and the School District's operating procedures do not violate the provisions of either the First or Fourteenth Amendment and, thus, were properly upheld by the Second Circuit.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Respectfully submitted,

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